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UNITED STATES DISTRICT COURT

DISTRICT OF DELAWARE

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MAGTEN ASSET MANAGEMENT CORPORATION and
LAW DEBENTURE TRUST COMPANY OF NEW YORK,
Plaintiffs,

-vs-

NORTHWESTERN CORPORATION,
Defendant.

Civil Action No. C.A. No. 04-1494 (JJF)

----- X

MAGTEN ASSET MANAGEMENT CORP.,
Plaintiff,

-vs-

MICHAEL J. HANSON and ERNIE J. KINDT,
Defendants.

Civil Action No. C.S. No. 05-499 (JJF)

----- X

DATE: November 13, 2007

TIME: 9:00 a.m.

Deposition of PAUL A. MARCUS, held at
the offices of Curtis, Mallet-Prevost, Colt &
Mosle, 101 Park Avenue, New York, New York,

1 - PAUL A. MARCUS -

2 pursuant to Notice, before Hope Menaker, a
3 Shorthand Reporter and Notary Public of the State
4 of New York.

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2 assume for -- with me for the moment that
3 Mr. Berliner did not come to the conclusions and
4 opinions in his report.

5 How would that change your opinion in
6 this matter?

7 MR. KAPLAN: Objection.

8 A. Not at all.

9 Q. Not at all?

10 A. Not at all.

11 Q. Did you do an independent assessment as
12 to whether or not there would be a covenant breach
13 by Northwestern on the \$280 million revolver with
14 CSFB?

15 A. I actually began a process of trying to
16 investigate that. I came to the conclusion that I
17 didn't have enough information to accurately
18 calculate those covenants, and I didn't pursue it.

19 And then at a certain point, as I
20 understood it, Mr. Berliner was going to perform
21 that analysis and had all the accounting
22 information required to do that, and, therefore, I
23 used his calculation.

24 Q. Sir, did you use his calculation, or did
25 you rely on his analysis?

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2 by an expert on the Commission?

3 Q. No. That's as specific as my question
4 is. It's pretty specific.

5 A. Let me try to answer it then. I can
6 tell you that I have extensive experience working
7 in financing utility companies and reviewing
8 opinions of commissions throughout the country in
9 many jurisdictions. I have experience in reviewing
10 other people's interpretation and understanding of
11 how those commissions function. And I would
12 consider myself an expert in interpreting and
13 understanding how commissions work, what positions
14 they put forth, their interests, and the
15 constituencies that they represent.

16 Q. Do you have any experience in dealing
17 with the Montana Public Service Commission?

18 A. I don't recall.

19 Q. Have you ever offered opinion testimony
20 as an expert about any aspect of the Montana Public
21 Service Commission?

22 MR. KAPLAN: Objection to the form.

23 A. I have not.

24 Q. Have you ever testified as an expert
25 before the Montana Public Service Commission?

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2 A. No, I have not.

3 Q. Have you ever testified as an expert
4 about any commission regulating utilities at a
5 state level?

6 A. I have not.

7 Q. Have you ever testified as an expert
8 about any utility regulatory commissions at a
9 federal level?

10 A. I have not.

11 Q. Sir, are you familiar with the statutory
12 authority or the statutory structure pursuant to
13 which the Montana Power -- strike that.

14 -- Montana Public Service Commission
15 derives its authority?

16 A. Not that I recall, no.

17 Q. Are you familiar with any regulations
18 governing the authority or procedures of the
19 Montana Public Service Commission?

20 A. Can you repeat that again, please?

21 MR. PIZZURRO: Can you read the
22 question, please?

23 (The question requested was read back by
24 the reporter.)

25 A. Yes.

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2 Q. And what are those regulations?

3 A. I can't specifically articulate which
4 regulations I've read. I have read through their
5 procedural announcements, their rulings on certain
6 cases; so from that perspective, I've actually seen
7 some of their rulings.

8 MS. BEATTY: Excuse me. Mr. Marcus, can
9 you speak up a little bit? You're hard to hear.

10 THE WITNESS: Sorry.

11 Q. Have you ever spoken to counsel about
12 the regulations governing the authority of the
13 Montana Public Service Commission?

14 MR. KAPLAN: Objection to the form.

15 A. I don't recall that specific discussion.

16 Q. Other than in this case, what rulings of
17 the Montana Public Service Commission have you
18 reviewed? And by "this case," what I mean are any
19 rulings that the Montana Public Service Commission
20 made in connection with either the acquisition of
21 the Montana Power assets by Northwestern or any
22 subsequent approvals of financings that
23 Northwestern did which might have been required by
24 the Montana Public Service Commission.

25 A. I'm sorry?

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2 Q. Better question.

3 Other than the proceedings and decisions
4 of the Montana Public Service Commission, which are
5 referenced in your report which is Exhibit 3, what
6 other rulings and cases of the Montana Public
7 Service Commission have you reviewed?

8 A. None that I recall.

9 Q. So is it safe to say --

10 MR. KAPLAN: Just for the record, I'm
11 not sure you cited the right exhibit. I'm not sure
12 it's Exhibit 3.

13 MR. PIZZURRO: I believe it is.

14 Q. Could you tell us -- when I say
15 Exhibit 3, I'm talking about Exhibit 3 in this
16 deposition, the deposition of today.

17 MR. KAPLAN: Okay. The deposition.

18 MR. PIZZURRO: I didn't mean any exhibit
19 to the report.

20 Q. What is the scope of the authority of
21 the Montana Public Service Commission?

22 MR. KAPLAN: Objection to the form. Are
23 you asking for a legal interpretation of their
24 scope of authority? What are you asking this
25 witness to testify about?

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2 constituents within their states. And I know that
3 from having worked with regulators in many
4 different states and having seen their opinions and
5 having seen how they interact with many different
6 utilities.

7 Q. Mr. Marcus, my question was: What is
8 the scope of the authority of the Montana Public
9 Service Commission?

10 If you want to say, "I don't know,"
11 that's fine. I would like an answer to that
12 question.

13 MR. KAPLAN: I still have an objection
14 to that question.

15 A. I can't give you a legal interpretation,
16 but I can give you an interpretation I have as a
17 layperson, which is that all commissions,
18 regardless of what state they're in, have an
19 obligation to protect the constituents within those
20 states -- protect the rate payers and consumers in
21 those states.

22 Q. I didn't ask you what their obligations
23 were. I asked what the scope of authority of the
24 Montana Public Service Commission was, what
25 authority does it have?

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2 MR. KAPLAN: Objection. Calls for legal
3 conclusion. Asked and answered.

4 A. As I just said, I can't give you a legal
5 conclusion what the scope is. But I can tell you
6 as a layperson the scope of the work that the
7 commissions do is -- include protecting the rate
8 payers and the constituents that they have in the
9 state.

10 Q. Let's go back to your opinions in
11 Paragraph 13. Looks to be -- I guess that's -- is
12 that a I? Bottom of Page 5 -- bottom of Page 5?

13 A. Yes.

14 Q. I'm just going to read the first part of
15 this, sir. It says, "The misstatements and
16 omissions in Northwestern's financial statements
17 registration statement in connection with the
18 \$720 million in bonds, and other public disclosures
19 during 2002, enabled the company to complete the
20 October 2002, \$87 million equity offering and the
21 transfer of the Northwestern Energy LLC assets to
22 Northwestern in November 2002."

23 Sir, what did you mean when you used the
24 word "enabled" in that sentence?

25 A. Meaning that the information that was

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2 I've come up with an opinion that's
3 based on assessing numerous documents, having years
4 of experience and knowledge of these markets and
5 these industries, and have concluded and given you
6 my opinion as to what would happen. What you want
7 to call it -- prediction versus not a prediction, I
8 can't define that for you right here.

9 Q. In the sentence that we were just
10 looking at, you say, "impeded by the attempts of
11 security holders."

12 Who are the security holders that you're
13 referring to here?

14 I'm not -- let me make it maybe a little
15 clearer. I'm not trying to trick the witness.

16 If you look at Paragraph 122 of your
17 opinion, the only security holders to which you
18 refer are the QUIPS holders. And I'm just trying
19 to get clear that that's what we're talking about
20 in this sentence, are the QUIPS holders.

21 MR. KAPLAN: Objection.
22 Mischaracterizes 122.

23 A. The security holders in the opinion is
24 general. That would be related to anyone who would
25 have felt that their interests would have been

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2 diserved by having the assets transferred.

3 What I think in Paragraph 122 talks
4 about stakeholders, and then there's a
5 parenthetical, says, "including those holding the
6 QUIPS." It doesn't eliminate anyone else who might
7 be an interested party in seeing the transfer not
8 happen.

9 Q. As you sit here today, sir, do you know
10 of any other security holders who have had such an
11 interest, in your opinion?

12 A. I think all of the security holders at
13 some level, whether they were secured or not
14 secured, or whoever they were in the capital
15 structure, had all of this bad information been out
16 in the marketplace would have had a variety of
17 different reactions and would have done whatever it
18 would take to protect their own positions.

19 And in this particular case, protecting
20 their position would entail keeping those assets
21 within the Montana Power fence, if you will, and
22 not being transferred out to Northwestern.

23 Q. So is it your testimony that all of the
24 security holders in Northwestern, secured debt,
25 unsecured debt, equity, would have an interest in

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2 trying to impede the going flat transaction or the
3 transfer of the assets and liabilities from the
4 subsidiary to the parent?

5 MR. KAPLAN: Objection to the form.

6 Q. Is that your testimony?

7 A. I have not analyzed each level and each
8 individual security holder in the capital
9 structure, and that would be required to answer
10 your question.

11 But I am saying that if any security
12 holder believed that things were as -- what had --
13 as they ultimately turned out to be, that they were
14 better off in a nonbankrupt, self-contained Montana
15 Power than they were in the Northwestern umbrella;
16 that it would be something that they would consider
17 and potentially could take action to try to impede.

18 Q. How were the QUIPS holders injured as a
19 result of the asset transfer and liability
20 assumption in November of '02?

21 MR. KAPLAN: Objection to the form.

22 A. I haven't been asked to assess damages
23 in this case.

24 Q. No, sir. I'm not asking the damages.
25 I'm asking how they would have been injured. How

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2 that they would have done whatever they could have
3 to protect their constituents. And to the extent
4 that that meant taking action, I believe that they
5 would have done that.

6 Q. My question wasn't whether they wanted
7 to do or not wanted to do.

8 My question is: Do you know what they
9 had the authority to do, yes or no?

10 A. I haven't made a legal determination of
11 what their authority is.

12 Q. You don't know, do you?

13 MR. KAPLAN: Objection. Asked and
14 answered.

15 Q. Withdrawn.

16 Do you know whether the Montana Public
17 Service Commission in its history has ever
18 rescinded approval of a transaction once that
19 approval had already been given? Ever?

20 A. That's a bit of a loaded question in
21 that if you're asking me for a good transaction,
22 did they rescind it? I don't know.

23 I don't know if there have been any
24 transactions where material information was omitted
25 or misrepresented and they were then put in a

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2 position of having to change their opinions. So I
3 guess it's not really a fair apples to apples
4 comparison.

5 Q. Fair enough.

6 When did the MPSC approve the
7 transaction, including the assets held at the
8 parent company?

9 MR. KAPLAN: Objection.

10 A. When you say the "transaction" --

11 Q. When did the MPSC approve Northwestern's
12 acquisition of Montana Power assets and
13 Northwestern's ability to hold those assets at the
14 parent company level?

15 A. I don't recall the specific date.

16 Q. Would it refresh your recollection if I
17 told you that it was in January of 2002?

18 A. Yes. That would be my understanding of
19 approximately when that happened.

20 Q. So you're not suggesting in any way that
21 any of the financial information upon which the
22 MPSC based that decision was false and misleading,
23 are you?

24 MR. KAPLAN: Objection to the form.

25 A. I haven't analyzed what information was

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2 available at the time or what was or was not false
3 and misleading. Obviously, there were
4 representations made about what the future held,
5 and I haven't assessed whether or not those were
6 misrepresented or not.

7 Q. I want to understand, Mr. Marcus, other
8 than your experience in dealing with utility
9 commissions, and having read the opinion of the
10 MPSC in connection with the approval of the
11 \$390 million secured financing in '03, is there
12 anything else that you base your opinion on that
13 the MPSC would have acted to impede the going flat
14 transaction?

15 MR. KAPLAN: Objection to the form.

16 A. Based on my belief that the financial
17 information that would have come out would have
18 been so bad and would have endangered the company
19 so much that it's just common sense that they would
20 do whatever they could to protect their
21 constituents.

22 Q. What could they do to protect their
23 constituents in those circumstances?

24 A. They could stop the assets from being
25 transferred. They could restrict salaries. They

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2 Q. Well, why didn't the MPSC just say,
3 "Give the assets back to your subsidiary
4 Northwestern Energy LLC"?

5 MR. KAPLAN: Objection.

6 A. At that point, I don't know if they had
7 the legal ability to do that. I just don't know
8 the answer to your question.

9 Q. You also don't know whether they had the
10 legal ability to impede the going flat transaction
11 having given their approval to the transaction in
12 January of '02, correct?

13 MR. KAPLAN: Objection.

14 Q. I'm just trying to probe the limits of
15 what your knowledge is concerning the scope of
16 authority and ability of the MPSC to act. You
17 offer an opinion they would have impeded.

18 A. That's correct.

19 Q. You don't know whether they could have
20 ordered the assets given back.

21 That's your testimony, correct?

22 A. My testimony is I don't know the legal
23 steps that they can take. I can tell you that my
24 experience has seen a variety of different measures
25 that utility commissions have taken to protect the

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2 Credit Suisse First Boston, CSFB, was the
3 administrative agent."

4 Do you see that, sir?

5 A. I do see that, yes.

6 Q. Do you have an opinion that this would
7 have occurred, which is independent of the analysis
8 and opinions offered by Mr. Berliner?

9 A. I haven't fully analyzed whether or not
10 there would have been a covenant default, as I
11 mentioned to you earlier. I did not have
12 sufficient information to complete that analysis.
13 I could if I were asked to.

14 Q. Sir, is the answer no? You have no
15 opinion independent of Mr. Berliner as to whether
16 there would have been a default on financial
17 covenants; is that your testimony?

18 MR. KAPLAN: Objection.

19 A. My testimony is that I used this piece
20 of information from Mr. Berliner because I did not
21 independently calculate the numbers myself. Were I
22 to calculate the numbers myself, I might come up
23 with the same opinion. I just haven't done that.

24 Q. You testified this morning you didn't do
25 that because you didn't feel you had sufficient

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2 Q. Did you ask Mr. Berliner -- strike that.

3 Did you ask anyone that such an
4 analysis, that is, an analysis of the goodwill
5 impairment and possible covenant breach on the
6 revolver be done?

7 MR. KAPLAN: Objection to the form.

8 A. I'm sorry. Could you repeat the
9 question? I thought you weren't done.

10 Q. Did you ask anyone that such an analysis
11 be prepared, that is, an analysis of goodwill
12 impairment and possible covenant breach of the
13 revolver?

14 MR. KAPLAN: Objection to the form.

15 A. Not that I recall.

16 Q. Do you know if anyone at Huron made such
17 a request?

18 A. Not that I know of.

19 Q. Prior to the time that you received
20 Mr. Berliner's documentation, had you included any
21 assumptions in your draft or any draft of your
22 report concerning a covenant breach and an
23 inability to draw on the revolver?

24 A. I don't recall.

25 Q. Again, I apologize if I'm repeating

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2 something we went over, but prior to receiving
3 Mr. Berliner's report, whatever it was you received
4 on that weekend, had you done any independent
5 analysis as to whether or not there was a covenant
6 breach and an inability to draw on the revolver?

7 A. And I believe what I testified to
8 earlier was that some analysis was done regarding
9 the covenants and what those covenants would have
10 been given -- the restated financial information,
11 and that I came to the conclusion after doing that
12 that I did not have sufficient information.

13 MR. KALECZYC: Can you keep your voice
14 up?

15 A. That I did not have sufficient
16 information to complete that analysis.

17 Q. When you made that realization, did you
18 then ever ask that someone else make that analysis?

19 A. I did not, no.

20 Q. Did anyone at Huron make such a request
21 of anyone, to the best of your knowledge?

22 A. Not to my knowledge, no.

23 Q. Was the asset -- you've called at this
24 time asset transfer and it's referred to in this
25 litigation as the going flat transaction.

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2 Q. Okay. Strike it. Withdrawn.

3 Let me refer you back again to your
4 Opinion -- Marcus Exhibit 3. Look at Page 7,
5 Paragraph -- looks like II, which is above the
6 background heading.

7 A. I see that.

8 Q. There it says -- this, again, is so
9 we're clear, this is in the portion of your report
10 which is headed "Summary of Opinions."

11 Do you see that, sir?

12 A. I do.

13 Q. II says, "Had the assets of Northwestern
14 Energy LLC not been transferred to Northwestern,
15 the QUIPS investors would have been covered by the
16 former's assets and not junior to the debt and
17 other liabilities of Northwestern Corporation."

18 Sir, do you have an understanding as to
19 why that opinion -- strike that.

20 -- as to how that opinion is relevant to
21 any issue in this lawsuit?

22 A. Not that I can recall, no.

23 Q. Why did you include it as an opinion?

24 A. As part of my assessment of the
25 company's prospects and analyzing it became an

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2 issue that became obvious, that, I guess, in
3 conversations with counsel there was a discussion
4 about it and I was asked the question, and I
5 included it as part of my opinions.

6 Q. Give us the best recollection you have
7 of your discussions with counsel about this
8 opinion.

9 A. My best recollections are that I was
10 asked whether or not they were better off or not,
11 depending where the assets were. And I said I
12 would analyze that and that's part of my opinion.
13 I guess I don't recall exactly how it became part
14 of the opinion.

15 Q. Do you recall in any of your discussions
16 with counsel obtaining an understanding as to why
17 it is relevant in this lawsuit as to whether the
18 QUIPS holders were better off as creditors of
19 Northwestern Energy LLC or Northwestern?

20 MR. KAPLAN: Objection to the form.

21 A. I don't recall a specific understanding
22 of that, no.

23 Q. Do you recall whether in any of those
24 discussions it was stated that the injury to the
25 QUIPS holders resulted from the conclusions that

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2 Energy -- the QUIPS debt at Northwestern Energy
3 LLC?

4 A. I don't recall.

5 Q. Do you know whether there was anything
6 in the indenture or debt covenants associated with
7 the QUIPS that would have prohibited Northwestern
8 Energy LLC from assuming additional or taking on
9 additional debt that was superior to the QUIPS
10 debt?

11 MR. KAPLAN: Objection to the form.

12 A. I don't recall. I'd have to look at the
13 agreements again.

14 Q. In preparation of your expert report,
15 Mr. Marcus, did you review the Montana statutes
16 which govern the Montana Public Service Commission?

17 A. I did not, no.

18 Q. Did you read any of the regulations of
19 the Montana Public Service Commission?

20 A. I did not, no.

21 Q. Earlier today in response to some
22 questions from Mr. Pizzurro, you talked about the
23 constituents of the Montana Public Service
24 Commission.

25 Who, in your opinion, are the

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2 Q. I think I know that you don't know.

3 MR. KAPLAN: Objection to the extra
4 commentary.

5 Q. Withdrawn.

6 Mr. Marcus, have you ever advised a
7 client on financing matters involving a company
8 regulated by the Montana Public Service Commission?

9 A. I might have. I just don't recall.

10 Q. In what capacity might you have done
11 that?

12 A. Most specifically, it would have been at
13 the time when I was a lender at Bank of America.
14 We lent money to companies in the utility industry.

15 I was doing that out of their Chicago
16 office so I was covering utilities all throughout
17 the midwest. Montana was not specifically a state
18 that was covered in our geographical area, although
19 I'm just not sure I remember whether or not some of
20 the utilities that I was working with would have
21 had some holding in Montana that would have caused
22 Montana to regulate them.

23 Q. But nothing that stands out in your mind
24 sitting here today?

25 A. That's correct.

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2 Q. Do you know what utilities operate in
3 Montana, regulated utilities?

4 A. Sitting here today, no.

5 Q. This morning I think you had testified,
6 if I took my note correctly, that you had reviewed
7 certain procedural pronouncements of the Montana
8 Public Service Commission.

9 Do you recall that testimony?

10 A. If by the "procedural pronouncements"
11 you're talking about the final order to the
12 dissenting order on the \$390 million bond offering,
13 I did review that.

14 Q. That would have been the order that came
15 out in the early part of 2003?

16 A. I believe that was the time frame.

17 Q. And that's the same order in which you
18 quote from the dissenting opinion of Commissioner
19 Brainard, B-R-A-I-N-A-R-D; is that correct?

20 A. That would be correct.

21 Q. Other than that one particular order,
22 did you review any other orders of the Montana
23 Public Service Commission?

24 A. I believe there were other things. I
25 just don't recall what they were specifically.

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2 Q. Would they be reflected in the exhibit
3 that's attached to your expert report?

4 A. They should be.

5 Q. If you could turn to the exhibit then,
6 just identify which other Public Service Commission
7 orders you may have relied upon.

8 MR. KAPLAN: I object to making the
9 witness go through a long list of many documents
10 and testing his memory and ability to find the
11 document on these long lists.

12 A. I'm not sure I could do that sitting
13 here today. Some of this stuff is identified by a
14 name and Bates number, but it could have an order
15 within it. I just -- I'm not trying to not answer
16 the question. I just can't answer it based on this
17 list.

18 Q. Other than the order which you have
19 already identified and testified to, do you recall
20 relying upon any other orders of the Public Service
21 Commission in Montana for purposes of opinions you
22 formulate in your expert report?

23 A. To the extent that I read other
24 opinions, they would have been included. I think
25 my thinking of how the Commission would react in

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2 certain situations and my recollection is that I
3 saw some other things from earlier in the time
4 period from the Commission. I just can't identify
5 them sitting here.

6 Q. Would they have been other things
7 related to the docket whose subject was the
8 acquisition of Montana Power LLC by Northwestern?

9 A. That would be my general understanding,
10 yes.

11 Q. Do you have any recollection of looking
12 at any orders of the Montana Public Service
13 Commission dealing with dockets involving regulated
14 utilities other than Northwestern Corporation?

15 A. I did not, no.

16 Q. How did you locate those other orders?
17 Did you find them or your staff find them or were
18 they given to you?

19 A. My staff provided them to me. I don't
20 know if they independently found those or they
21 requested them from counsel. I just don't know the
22 answer to that.

23 Q. Are there any opinions or orders of the
24 Public Service Commission on which you relied that
25 are not referenced somewhere in your expert report?

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2 of different information releases. I have been
3 involved in seeing how they treated different
4 companies under a whole bunch of different
5 scenarios, if that answers your question.

6 Q. In those other situations, were you
7 called upon to render expert opinion as you have
8 done in this case?

9 MR. KAPLAN: Objection to the form.

10 A. No. They would have been in situations
11 where I was actually financing the utilities, for
12 the most part of that time.

13 Q. This would have been the time when you
14 worked for Bank of America?

15 A. Bank of America and Shawmut Corporation.

16 Q. Since the time that you left Bank of
17 America and Shawmut, have you rendered any opinions
18 similar to the type that you render here about what
19 a public service commission might do in a
20 particular set of circumstances?

21 A. In a legal case?

22 Q. In a legal case.

23 A. I have not, no.

24 Q. How about other than in a legal case?

25 A. I have had clients over the years who

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2 were utility companies where I might have given
3 them advice or guidance as to how I thought a
4 regulator might respond to things.

5 Q. But never as an -- as a testifying
6 witness in a legal proceeding. By "legal
7 proceeding," I would include a regulatory
8 proceeding as well as a court proceeding.

9 A. That's correct.

10 Q. On which state commissions were you
11 opining on to your clients in these other
12 nonlitigated matters?

13 A. Massachusetts would have been one. I
14 think New York might have been one. Those are two
15 that I recall.

16 Q. Did you review the report by Steve
17 Scherf filed on behalf of Messrs. Hanson and Kindt
18 in this case?

19 A. "Review" would be a strong word. I did
20 skim through it quickly.

21 Q. And in your looking at Mr. Scherf's
22 report, do you have any opinions or criticisms of
23 his report?

24 MR. KAPLAN: Objection.

25 A. Sitting here, I can't really remember